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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 919

ORVILLE GOLDEN, PETITIONER,

vs.

STATE OF MISSOURI, RESPONDENT.

Petition for Writ of Certiorari and Brief In Support Thereof.

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INDEX.

	PAGE
Petition for writ of certiorari	1
(A) Statement of matters involved	1
(B) The Facts	2
(C) Questions presented	7
(D) Reasons for granting the writ	8
Brief in support of the petition for certiorari	9
(A) Opinion of the Court below	9
(B) Statement of Jurisdiction	9
(C) Statement of the Case	9
(D) Specification of errors	10
(E) Summary of Argument	12
(F) Argument	19
(G) Conclusion	26

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PETITION FOR WRIT OF CERTIORARI.

To The Honorable Harlan Fiske Stone, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, Orville Golden, respectfully shows to this Honorable Court:

STATEMENT OF MATTERS INVOLVED.

This is a criminal cause in which Orville Golden, Earl Jenkins, Paul Hulehan, and Edward Hill were indicted for

the crime of embezzlement in an alleged violation of Section 4478, R. S. Missouri, 1939. Severance was granted in the cause and the defendants were tried separately.

The defendant filed a demurrer to the indictment, a motion to quash the indictment and a motion to strike, all of which were by the Court, overruled. Upon trial of the cause in the Circuit Court of the City of St. Louis, the defendant was convicted and sentenced to three years in the State Penitentiary.

Motion for new trial was duly filed and was by the Court overruled. Appeal was asked and granted to the Supreme Court of the State of Missouri and the judgment of the trial court was sustained. Thereafter a motion for rehearing and to transfer to the Court en banc was filed within the time allotted by Statute and was by the Supreme Court of the State of Missouri overruled. The petitioner brings the case here for a writ of certiorari.

THE FACTS.

Orville Golden, Earl Jenkins, Paul Hulahan, and Edward Hill were jointly indicted but were tried separately. Jenkins was acquitted; Hill was convicted but the cause was reversed by the Supreme Court of the State of Missouri and is now pending trial in the Circuit Court of the City of St. Louis. The defendant Hulahan was tried once but a mistrial resulted and his cause is still pending in the Circuit Court of the City of St. Louis.

The indictment in this case consisted of over nine pages of legal size typewritten matter and was challenged by the defendant by demurrer, motion to quash and motion to strike. The reasons for said motions being that the indictment was so vague and uncertain that it did not inform the defendant, Golden, of the charges which he would be forced to meet. After the overruling by the Court of the motions aforesaid, the defendant, Golden, filed a motion for continuance, setting out as his grounds that he could not have a fair trial in the City of St. Louis at that time

for the reason that the newspaper publicity had inflamed the public mind against the defendant to the point where he was unable to impanel a jury which was not prejudiced against him. This motion was also overruled by the Court.

In support of the motion for continuance, the defendant, Golden, set out 29 newspaper articles carried by the local newspapers which are preserved in the record herein.

It was also shown that at the time that this cause came for trial that there were investigations being made by the Judges of the Circuit Court, two separate Grand Jury investigations of the jury system, by separate and independent investigations then being had by the Clerk of the Circuit Court and by the acting Circuit Attorney of the City of St. Louis, by an investigation ordered by the jury supervisors consisting of the 18 Judges of the Circuit Court, the Jury Commissioners and the Clerk of the Circuit Court and by an independent investigation by a lay agency, called in and authorized by the Judges of the Circuit Court. The last mentioned agency was known as the Governmental Research Institute.

The evidence showed that the four men indicted were officers of what is known as Local No. 42, being a branch of the American Federation of Labor and the International Hodcarriers, Building and Common Laborers' Union of America.

The defendant, Golden, was the financial secretary and treasurer, Hill was President, and Hulahan and Jenkins were business representatives. The organization was described as a benevolent trade organization. The offices were located on Finney Avenue, west of Grand Avenue, in St. Louis, Missouri. In the years 1940 and 1941 there was considerable war work in St. Louis and attracted a great number of applicants for membership in the Union. The Union received an unusual amount of initiation fees from laborers desiring to work in the various war plants. There were three types of membership in the Union, and were classified as follows:—"Residential" which required an initiation fee of $15.00; "TNT" which required a fee of

$25.00 and "Commercial" which required a fee of $50.00. In addition to the initiation fee, each member was required to pay quarterly dues of $6.00 and 50 cents for a death fund. The total membership fees therefore were $21.50, $31.50 and $56.50 respectively.

In addition to the above mentioned officers, there also were two female employees and other male employees who received money from time to time and issued receipts therefor. Applicants for membership in the Union were permitted to pay initiation fees and dues in installments, during which time they were given what is commonly known as a "work permit". Upon completion of payments, the receipts given were required to be returned to the Union so that a membership card and book issued by the main office in Washington, D. C., could be issued.

According to the testimony of Luella Jones, (one of the female employees) it appears that the bookkeeping method used was to take the receipts brought in by the prospective members of the amount they had paid and when the total amount due was paid, she would send the membership application in to the Main Office. There was a card index and a per capita list from which the "per capita tax sheets" were compiled in Washington. There was also a daily cash book kept but the entries were not ordinarily made simultaneously with the payments made by the members.

The evidence in the case showed that it was a customary practice in the office to stamp the receipts which were issued with a rubber stamp bearing the name of the defendant, Golden.

The evidence showed that Orville Golden was absent from St. Louis from August 4, 1941 until September 22, 1941, and that during that time money receipts were issued stamped with the name of the defendant, Golden.

The evidence shows that the indictment was based principally upon an audit made by one Alfred M. Bleecker,

who testified that he was a certified public accountant and that he made his audit from the index cards, ledgers, and cash books and from information furnished to him by private investigations.

It was shown that during the time the defendant was out of the City huge sums of money were collected which were placed in safety deposit boxes under the name of Edward Hill.

The evidence further showed that on the day of September 29, 1941, two men representing themselves to be agents of the department of internal revenue came into the Union headquarters and demanded to check the affairs and records of the local. These men told the defendant it would be necessary to go to the bank and count the money which was in the safety deposit boxes. After arriving at the bank the so-called agents said that it would be necessary to take the money to the Federal building for a further count. They gave the defendant a receipt for the money and made an appointment with him for the following morning. These men were never seen again, and the defendant reported the personation to the F. B. I. During the course of the investigation which ensued the officers of the F. B. I. told the defendant that it was apparent that someone was embezzling the funds of the local and asked him to sign a confession implicating the other officers of the local so that the authorities would have something to base their charges upon. This the defendant did, whereupon he was arrested and indicted.

After the conviction of the defendant in the Circuit Court of St. Louis, an appeal was taken to the Supreme Court of the State of Missouri which affirmed the judgment of the trial court. Thereafter the defendant filed a motion for rehearing or to transfer to the Court en banc in which he presented the following propositions of law in the following language:

I. The Court erred in failing to rule on the sufficiency of indictment, and particularly in relation to the motion

to strike which was filed and preserved in the motion for new trial.

II. The Court erred in overlooking appellant's contention as to the conduct of the circuit attorney Morris, and his undue and unwarranted attempt to convict this defendant at any cost.

III. The Court overlooked and failed to comment upon the refusal of the trial court to permit appellant upon cross-examination to inquire of the state's witness Coyne (who was a member of the Union) whether or not he thought that the appellant had stolen anything from him.

IV. The Court erred in overlooking and failing to pass upon appellant's assignment of error in relation to the reading of the grand jury notes to the trial jury in this case.

V. The Court overlooked and failed to pass upon appellant's assignment of error in regard to the witness Hunt, testifying to what he learned from a telephone conversation with Hill.

VI. The Court erred in overlooking and failing to pass upon appellant's assignment of error Number 18.

VII. The Court erred in overlooking and failing to pass upon appellant's assignment of error relating to the witness Blecker testifying from records not introduced in evidence and not verified.

VIII. The Court erred in overlooking and failing to pass upon appellant's assignment of error Number 45.

IX. The Court erred in failing to pass upon appellant's assignment of error Number 46.

X. The Court erred in overlooking and failing to pass upon appellant's assignment of error Number 11.

XI. The Court overlooked and failed to comment upon appellant's assignment of error Number 56.

XII. The appellant avers that there is a federal question involved in this case, and for that reason, in the event

the Court does not see fit to grant a rehearing, the case should be transferred to the Court en banc.

Your petitioner cited cases and authorities for each of the propositions involved and presented in the motion for rehearing and to transfer to the Court en banc, but the said Supreme Court overruled the motion on the 13th day of Nov. 1944.

Your petitioner submits that the said Supreme Court of the State of Missouri committed error in deciding said propositions of law so presented to it by the petitioner both in petitioner's original brief and in his motion for rehearing. Wherefore the petitioner presents to this honorable court the following questions:

QUESTIONS PRESENTED.

1. Is the fact that the defendant, Golden, was refused a continuance in view of the showing made of the adverse publicity and the investigations and prejudice on the part of the numerous jury panels called, denied his right of a trial by a fair and impartial jury as guaranteed by the 6th Amendment to the Constitution of the United States.

2. Does the fact that the State of Missouri used evidence against the defendant, Golden, in the nature of secret reports and hearsay evidence, which the defendant was denied the right to see, violate his right to meet and confront his accusers as guaranteed by the 6th Amendment to the Constitution of the United States.

3. Does the fact that Grand Jury notes were read to the Jury and placed in evidence under the guise of refreshing the memory of the witness and over the objection of the defendant, violate the right of the defendant, Golden, to face his accusers as guaranteed by the 6th Amendment to the Constitution of the United States.

4. Does the fact that the defendant, Golden, was denied by the trial Court the right to cross-examine witnesses in order to show their bias and prejudice or interest in the

case, violate his Constitutional rights as provided by the 6th Amendment to the Constitution of the United States.

5. Does the fact that the evidence in this cause was wholly insufficient to sustain the indictment, violate the Constitutional right of the defendant under the 14th amendment which guarantees him that he shall not be deprived of his liberty without due process of law.

6. Does the fact that the indictment in this cause was vague, indefinite, uncertain, verbose and duplicious and failed to properly inform the defendant of the charges which he was called upon to meet, deny the defendant his right under the Constitution to be informed of the charges against him.

7. Does the fact Circuit Attorney, Morris, did everything he could to arouse the public against this defendant including making statements to the newspapers, investigating the jury system, appearing before the jury commissioners, writing letters to members of the Union, using unfair trial tactics, and doing everything possible to obtain a conviction in this case, regardless of how it was accomplished, deny the defendant a fair and impartial trial as provided by the Constitutions of the United States and the State of Missouri.

REASONS FOR GRANTING THE WRIT.

I.

The judgment of the Supreme Court of the State of Missouri affirming the judgment of the trial court and overruling defendant's motion for a rehearing and to transfer to the Court en banc deprived the defendant of his liberty without due process of law contrary to the sixth and fourteenth amendments to the Constitution of the United States.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued by this honorable Court, and that the decision of the Supreme Court of Missouri be reversed.

MORRIS A. SHENKER,
CASPER YOST,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion of the Supreme Court of the State of Missouri.

The opinion of the Supreme Court appears at pages 33-48 of the record. The order denying the motion for rehearing and to transfer to the Court en banc appears at page 77 of the record.

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the judicial code as amended by the act of February 13, 1925, Section 347 (a), Title 28, U. S. Code.

The date of the judgment of the trial court is 2/19/43. An appeal was duly perfected and there was a decision in the Supreme Court of the State of Missouri on 9/5/44. Motion for rehearing and to transfer to the Court was overruled on 11/13/44.

III.

Statement of the Case.

In the petition, at pages 2 to 5, is a statement of the case so far as the law and the facts are material to the consideration of the questions here presented. In the interest of brevity this statement is not repeated.

SPECIFICATION OF ERRORS.

I.

The trial court erred in refusing the appellant a continuance upon his showing that the jury was prejudiced against him at the time of the trial by reason of unfavorable newspaper publicity, labor affiliations, and numerous jury investigations by different agencies, as well as the comments of the Acting Circuit Attorney, which were given wide publicity in the local papers before the trial.

II.

The trial court erred in admitting evidence against the appellant in the nature of secret reports, confidential investigations, conclusions of witnesses, hearsay evidence and audits of books which were admittedly not made by the appellant or under his direction.

III.

The trial court erred in permitting the Circuit Attorney to read from an instrument of writing which purported to be grand jury notes in the presence of the jury under the guise of refreshing the memory of the State's witness.

IV.

The trial court erred in refusing to permit the attorney for the appellant to cross-examine the state's witnesses as to their bias or prejudice against the appellant.

V.

The trial court should have sustained the demurrer of the appellant at the close of the case, should have granted a new trial, and the Supreme Court should have reversed

the cause for the reason that the evidence in this cause was wholly insufficient to sustain the issues and the indictment.

VI.

The indictment in this cause was defective in that it did not properly inform the defendant of the charges which he was forced to meet.

VII.

The Supreme Court of the State of Missouri erred in failing to take into consideration the unwarranted, unprecedented and unjustified tactics of the Circuit attorney to obtain a conviction in this cause.

SUMMARY OF ARGUMENT.

A.

Specification of Error I.

The evidence in this cause shows that the defendant was not granted a fair and impartial trial because of the unparalleled newspaper publicity which was given to the case; the labor affiliations of the jury panel and because of the fact that panel and the whole jury system was being investigated at the very time this defendant was forced to trial. We are aware of this honorable court's rulings in many cases holding that the granting of a continuance is discretionary with the trial court, but this Court has also said many times that this is only the rule when there is not a GROSS ABUSE OF DISCRETION. The defendant introduced many inflammatory articles from the local newspapers in regard to the jury system, to other defendants in this cause, and also introduced evidence showing the different investigations which were being conducted at the time of this trial. All of this evidence together with the fact that 78 jurymen had to be called before 24 could qualify (which qualification was challenged then and now by the defendant) was disregarded by the Supreme Court of the State of Missouri. The following authorities are cited in support of this specification: 14th amendment to the Constitution of the United States, Article 2 Section 22, Constitution of the State of Missouri.

22 C. J. S. Section 497;

Seay v. State, 93 So. 403, 207 Alabama, 453;

McDaniel v. Commonwealth, 205 S. W. 915, 181 Kentucky, 766;

Fountain v. State, 107 A. 554, 135 Md. 77, 5 A. L. R. 908;

State v. Rasor, 167 S. E. 396, 168 S. C. 221, 66 A. L. R. 1237;

Mickle v. State, 213 S. W. 665, 85 Tex. Cr. 560;

16 Corpus Juris, Note 25;

State v. Taylor, 8 S. W. 2d 29;

State v. Owens, 259 S. W. 100;

Goldsby v. United States, 160 U. S. 70;

Pickett v. United States, 216 U. S. 456;

Reynolds v. United States 98 U. S. 145;

Paschen v. United States 70 Fed. 2d 491;

Allen, et al. v. United States, 4 Fed. 2d 698.

Specification of Error II.

The decision of the Supreme Court of the State of Missouri holding that the hearsay evidence used to convict this petitioner was not error is in conflict with the decisions of this Court and every State Court. There was no denial of the fact that the Witness Blecker (who was the chief witness against this appellant) used records not made by this petitioner, nor under his control or at his direction. Secret and confidential reports were used and the defendant was denied the right to see them, or to cross-examine the witnesses against him. The witness was allowed to testify, over the objection of the defendant, to surmises and guesses. An instance of this was the witness testifying to a certain book which contained "blank pages", counting the lines and deducing from them that so many members were initiated into the Union. This and other testimony which was permitted by the trial Court is the rankest sort of hearsay evidence. It is also called to this Court's attention that the police department of the City of St. Louis sent out letters to different people, not known to the defendant, asking them questions about their payments etc., and the answers received were used by the

auditor Blecker to arrive at his conclusions as to the embezzlement.

In support of this specification we cite the following authorities.

14th amendment to the constitution of the United States;

6th amendment to the constitution of the United States;

State v. Gallina, 178 S. W. 2d 433;

Article 2, Section 22, Missouri Constitution;

People v. Nutter, 237 N. W. 384, 255 Mich. 207;

State v. Bigham, 131 S. E. 603, 133 S. C. 491;

Delayney v. U. S., 44 S. Ct. 206, 263 U. S. 586;

People v. Sorrells, 127 N. E. 651, 293 Ill. 591;

State v. Crooker, 122 A. 865, 123 Me. 310, 33 A. L. R. 821.

Specification of Error Number III.

It was error for the Supreme Court of the State of Missouri to fail to give consideration to the appellant's assignment of error pertaining to the use of the grand jury notes by the Circuit Attorney. This again bears upon the question of the right of the defendant to face his accusers. The record discloses that the Circuit Attorney under the guise of refreshing the memory of a witness read from what was called grand jury notes, over the objection of the defendant. The defendant asked to see the document but that privilege was denied him. The State was attempting to impeach its own witness and got the evidence before the jury.

In support of this contention the defendant refers the Court to the authorities cited under specification number two as well as the following.

State v. Johnson, 22 S. W. lc. 465;

State v. Baker, 20 Missouri 224;

McClellan v. Richardson, 13 Me. 82;

State v. Bowen, 172 S. W. 367;

State v. Burke, 132 Mo.

Hickory v. United States, 151 U. S. 303;

Clancy v. Transit Co., 192 Mo. 615;

State v. Patton, 255 Mo. 245, 164 S. W. 223;

State v. Gadwood, 342 Missouri 466;

State v. Gregory, 339 Mo. 133;

State v. Murphy, 345 Mo. 358.

Specification of Error Number IV.

The Supreme Court erred in failing to hold it error for the trial Court to deny the defendant the right to cross-examine the witness Coyne and other witnesses who were members of the Union and who testified for the state. The defendant sought to ask him questions to show his bias or prejudice or his interest in the case, if any. The question which the court refused the defendant was whether or not the witness thought that the defendant embezzled any money from the Union. The jury always has the right to know the interest of a witness in a case, and certainly the defendant had the right to show why the witness testified as he did.

In support of this contention we cite the following authorities.

Amendment Number 14 United States constitution;

Shepard v. United States, 290 U. S. 96;

Furlong v. U. S. 10 Fed. 2d 492;

State v. Johnson, 163 S. W. 2d 780;

State v. Pruett, 144 Mo. 92;

State v. Decker, 143 S. W. 544;

State v. Thornhill, 177 Mo. 691;

Dotterer v. State, 172 Ind., 357, 88 N. E. 689, 30 L. R. A. (NS) 846.

Specification of Error Number V.

The Supreme Court of the State of Missouri erred in holding that the evidence in this case was sufficient. As we shall show later, that there was absolutely no showing of the defendant's guilt, except a so-called confession, which the defendant strenuously objected to and which was obtained by trickery. The confession introduced was not a confession of the crime which the defendant was charged with. It stands then, that the state never proved the corpus delicti in this cause. The State depended upon hearsay and circumstantial evidence. By inuendo and presumptions and unfair tactics the State managed to convict this defendant, but taking the evidence in its entirety we submit that the State should never have been allowed to go to the jury.

The defendant's demurrer should have been sustained.

In support of this specification we cite the following cases, and authorities.

The 14th amendment to the constitution of the United States;

Paschen v. United States, 70 Federal (2d) 491.

Specification of Error Number VI.

Your petitioner respectfully insists to this Honorable Court that the indictment in this cause failed to inform the defendant of the charges which he was forced to meet. That the Supreme Court of the State of Missouri in ruling on a companion case said that the indictment was "lengthy and verbose, covering 10 pages of the State's Brief * * * * We agree with the appellant that the indictment is somewhat confusing. * * * * It contains much surplusage and many repetitions." This was taken from the Case of State v. Hill, decided by division number 2 of the Missouri Supreme Court on April 3, 1944. In the Hill case just mentioned a demurrer and a motion to quash the indictment was filed by the defendant, but the Court held that

the proper remedy was to file a motion to strike. This the petitioner did. In spite of this attempt by the petitioner to comply with the ruling of the Court, the Court completely disregarded his allegations as to the indictment. In support of this specification the petitioner cites the following authorities.

Amendment number 14 to the United States Constitution;

Section 22 of Article 11, Constitution of Missouri;

State v. Burke, 60 S.W. 1100, 150. 568;

State v. Flint, 62 Mo. 393;

State v. Harroun, 98 S.W. 467;

31 C. J. pp. 793, 812;

State v. Flyn, 258 Mo. 220;

State v. Reakey, 62 Mo. 40;

State v. Meysenburg, 71 S.W. 229;

State v. Stegner, 207 S.W. 626;

State v. Adams, 274 S.W. 21, 308 Mo. 664;

State v. Brown, 296 S.W. 125;

State v. Kellman, 123 S. W. 2d l.c. 72.

Specification of Error Number VII.

The extremes which the Circuit attorney went to in this case in order to secure a conviction is unparalleled in the annal of our Courts. Space does not permit your petitioner to go into the record fully as he did in his original brief and motion for rehearing, but we wish to call the Court's attention to the fact that this defendant was not granted a fair and impartial trial by reason of the acts of the Circuit Attorney (the agent of the State of Missouri, and therefore the State). Your petitioner contends that it is not only the duty of the agents of the State to see that jus-

tice is done to the State, but also a citizen of that State whose life or liberty is at stake. No one can condemn a prosecutor for his deal and determination to convict a guilty man, or for using every available ethical and fair means to see that the public is protected and the guilty are given the punishment which they deserve for their misconduct. On the other hand it is a violation of the most sacred rights of our land for a representative of the government, out of personal animosity or an attempt to gain glory for himself, to resort to trickery, unethical, unfair, and fraudulent practices in order to convict, a man is entitled to a fair trial by a jury of his peers.

In support of this contention we cite the following authorities and cases:

14th amendment to the Constitution of the United States;

Article II, Section 22 of the Constitution of the State of Missouri;

State v. Owens, 259 S.W. 100;

State v. Couch, 98 S.W. 2d 550;

State v. Nicholson, 7 S.W. 2d. 375;

State v. Jones, 268 S.W. 83, 306 Mo. 437.

ARGUMENT.

Your appellant respectfully submits to this Honorable Court that the instant cause is one of the most unusual in the history of this nation. The cause was set for trial on May 11, 1942 at which time the defendant asked for a continuance on the grounds that the public mind was prejudiced against him by reason of newspaper articles, jury investigations and labor affiliations. It was necessary to examine seventy-eight (78) veniremen before twenty-four men could be selected as competent to try the issues. Fifty-four men were excused because of the fact that they had read the inflammatory articles which were carried in the local papers or for the reason that they had formed an opinion as to the guilt of the defendant. The appellant set out in his brief to the Supreme Court of the State of Missouri the various named jurors that were allowed to remain upon the panel even though they admitted that they had read the articles and were interested in the case. We submit that the rights of the defendant were not protected and that he was forced to trial before a jury that was admittedly biased, coerced, and partial.

We respectfully refer the Court to the appellant's brief beginning upon page 80 in which such statements as "St. Louis Rotten Jury System", "Criticism of the Jury System to be laid before the Grand Jury" and many other such headlines were being carried in the local papers at the time that the defendant was forced to trial, over his objection and protest. Many of the panel testified that they had read these articles, but said that they could render a fair decision nevertheless. We submit that no man could have read these articles and editorials, been subjected to questioning by various agencies and still be able to sit impartially. It is beyond all bounds of reason that any

man mentally capable of sitting upon a jury would not realize (even though he stated otherwise) that he was involved in a very unusual case. The Supreme Court in its opinion sets out that the newspaper articles were so inflammatory as to cause several investigations, but go on to say that the result of the investigations showed that the jury system was upheld. This was not the point raised by the defendant. We contended, and still contend, that the investigations, newspaper articles, and statements by the circuit attorney (in addition to the fact that the jury was improperly called) all denied the defendant a trial by a fair and impartial jury as guaranteed him by the Constitution of this State and of the United States. It makes no difference whether the investigations disclosed that the St. Louis Jury system was not "rotten". The only point involved was whether or not the jurymen could be impartial in the light of the pressure which was brought to bear upon them before and at the time of this trial.

In this connection we would like to quote from the case of Paschen vs. United States, 70 Fed. 2d, 491 in which a continuance was asked upon the grounds of inflammatory news articles against the defendant which appeared in the press. In that case Judge Alschuler said:

"The reprehensibility of the publications, as stated by the Government, extends not only to the publications themselves but as well as disclosures and information stated in the article to have been made by "Government Men" and "Government agents" as the authority for the publications. Government men and government agents have no more right in advance of trials to reveal such information than have the newspapers to publish it. *It is unfair for persons about to go on trial for their liberty*, and to the Government, whose plans of procedure are thus made public. * * * * * * what is said herein is prompted not alone by what occurred, but as well by the great frequency of similar infractions of the individual and public rights and interests. We said this in effect in Allen, et al. vs. United States, 4 Fed. (2d) 698, (but strangely enough) it seems the *reprehensible practices go merrily along.*

We agree that the disposition of the motion was within the sound discretion of the Court. *The record here does not disclose whether any of the jurors had read or heard of these particular articles* and we cannot say that the Court's discretion was abused in its denial of the motions."

Such was not the case in the instant cause. We have heretofore set out in the original brief in the Supreme Court of the State of Missouri the extracts from the examination of the jury in which it is shown that practically all the panel had read the inflammatory articles and many of them had formed opinions. Just as in the Paschen case, the Circuit Attorney Morris made statements to the press, which were bound to have affected the public mind.

Your petitioner urges this Honorable Court to consider the nature of the evidence used against him which has been heretofore set out. We call attention to a recent decision of the Supreme Court of Missouri wherein the States used the same tactics as were used in this case and the same type of evidence was permitted to be used in the trial of the cause. The Court said in the Case of State vs. Gallina, 178 S. W. 433 "In respect to the issue the State and the accused occupy essentially different positions. An accused is entitled to the full weight of, among others, the constitutional provisions of which the English people boast, reading: * * * the accused shall have the right * * * to meet the witness against him face to face * * * * * Mo. Const. Art. 2, Section 22; State vs. Butler, 247 Mo. 685, 153 S. W. 1042, 1044 (1) * * * * * The only evidence offered on the witness' non-residence were statements made to the assistant Circuit attorney by a third party. Even though statements made by an absent witness of his moving to another State be considered acts and not hearsay, *testimony of what some third party said was clearly hearsay.*" The judgment of the trial court in this case was reversed for the above error. How can this Court reconcile that decision (which is the fundamental law of the land) with the judgment of the Supreme Court of the State of Missouri when the States' own witness admitted

that he had used letters furnished by the Circuit Attorney's office to arrive at his conclusions as to what the defendand had done? All of this testimony was objected to and exceptions were saved.

The use of the Grand jury notes by the prosecuting attorney in an attempt to impeach his own witness and to get evidence before the Jury which they should never have heard, is inexcusable and manifestly error. It violates the most sacred rights of this nation. What will happen if the people of this country know that no longer is the testimony given by them before grand juries kept secret as provided by the statutes?

In the case of State vs. Patton, 164 S. W. 233, the Supreme Court of the State of Missouri said: "Our bill of rights as written in our constitution, provides that an accused person upon his trial has the right to be confronted with his accusers. What was done here violated the right of confrontation. * * * * In the case at bar, the learned and diligent prosecuting attorney read verbatim to the witnesses Moore and Qualls, and to other witnesses for the State, question after question and answer after answer from the paper which the attorney stated was the transcript of the testimony of these witnesses before the grand jury. As to one or more of the witnesses the transcript of the witness' testimony was not identified by him, nor its identity otherwise appear, either as being the record of the grand jury, or as being a true copy of the testimony of such witness before that body, but the State plunged in medias rea and began reading the answers from the paper to the jury, merely pausing occasionally to ask the witness if he had made such answers before the grand jury. For these reasons which we labor to make clear, *this was prejudicial error for which the case must be reversed.*"

We agree with this statement of the law by the Supreme Court of the State of Missouri, and submit that the decision in the instant case was clearly in conflict with the opinion, especially in view of the fact that the Court in its opinion did not even see fit to comment upon the question.

There is no more firmly established right than that of a defendant to cross examine witnesses against him to show their interest in the outcome of the case or their bias and prejudice against him. In this case the defendant was denied that right. He was not permitted to ask the State witnesses who were union members whether or not they thought that the defendant had stolen from them, which would surely have shown their interest and their bias if their answer had been "yes".

In the case of Furlong v. United States, 10 Fed. 2d, 492, the Court in passing upon this question said, "No rule is better established than the right to show the bias and prejudice of a witness towards a party to the suit as a part of his cross examination" * * * It is elementary doctrine that hatred, interest, and ill will are among the most potent forces in coloring testimony."

We believe that the rule as stated above is decisive of this case, and that for this reason, if no other, the judgment of the Supreme Court of the State of Missouri should be reversed.

We have heretofore set out in the original brief in the Supreme Court of the State of Missouri and this record is here before this Honorable Court, in relation the sufficiency of the evidence upon which this defendant was convicted. We have searched the records in vain and have not been able to find a case wherein a person was deprived of his liberty on such flimsy and incompetent evidence as was introduced by the state in this case. The *only* testimony of any consequence was given by the auditor, Blecker, and we have previously shown that that evidence was hearsay and not admissible in evidence. This defendant was charged with embezzlement of a huge sum of money, but it was never shown that he had the money in his possession. After the investigation was started Hill and the other officers brought in a large sum of money, that they had in *their possession*. None was found upon the defendant or in his possession. The fact is that the State failed utterly to show what amount was taken and by whom.

The indictment in this case is absolutely ununderstandable. It is not only verbose and confusing as the Supreme Court of Missouri said, but after diligent study it is not clear just what this defendant was convicted of or tried for. We submit to this Honorable Court that a reading of this indictment will show that this defendant was not properly informed against. The defendant attempted by every legal means provided in the State of Missouri to compel the State to properly inform against him by demurrer, by motion to quash, and by a motion to strike. He was denied this right, in the face of the previous opinion of the Court in a companion case wherein the same indictment was passed upon, and the Court stated in substance that a motion to strike the surplusage was the proper remedy to correct the defects in the indictment.

Your petitioner pointed out in his original brief and motion for a rehearing in the Missouri Supreme Court the specific instances of the misconduct on the part of the Circuit Attorney Morris, but the Supreme Court saw fit to disregard the assignment and not pass upon it at all. We still feel that in a great democracy such as the United States a citizen is entitled to the constitutional guarantees afforded him. The Circuit Attorney in this cause had just previous to the trial of the defendant, lost the Jenkins case which was a companion case to this case. His acts therefore showed that he was highly incensed and thought that he should have won the Jenkins case. He talked to the Press, stating that the jury system was rotten in St. Louis, he called for grand jury investigations, he employed private investigators, he hurled all sorts of accusations at the board of jury supervisors—finally forcing them to meet to defend and exonerate themselves. It is significant that when he was called upon to substantiate his charges he could not do so. What other purpose could he have had in mind than to vindicate himself in the eyes of the public and inflame the public mind against the rest of the defendants? After all these statements and acts of the Circuit Attorney had been called to the attention of the public, he HAD to win the instant case to save his self-respect. The Circuit Attorney did not stop with the above

acts; he went still farther. He personally called a panel of jurors to try this defendant, contrary to the rules laid down by the laws of the State of Missouri. He segregated a portion of the panel. During the trial of the case he resorted to every trick and ruse possible in his attempt to browbeat witnesses, place in evidence incompetent and hearsay evidence to the extent that the Supreme Court of the State said in its opinion that "We say however, without hestitation that the practice is UNETHICAL AND IMPROPER AND SHOULD NOT BE TOLERATED BY TRIAL JUDGES". The court was referring here to the practice of the Circuit Attorney in calling the jurors by their given names. It was also shown that on many occasions the Circuit Attorney had to be rebuked by the trial judge, and the jury instructed to disregard his statements. On one occasion he withdrew his statements, BUT THEY STILL WERE BEFORE THE JURY. Your petitioner respectfully states that he cannot see how the Supreme Court of the State of Missouri could reconcile its judgment with the facts as set out in the opinion and as shown in the record in this case.

In the case of State vs. Nicholson the Supreme Court of Missouri had this to say in regard to the conduct of prosecuting attorneys: "It is commendable for prosecuting attorneys to be deeply interested in enforcing the law and to use their utmost ability and knowledge to see that the State is properly represented, BUT IT IS ALSO THEIR DUTY TO KEEP IN MIND THE FACT THAT THAT THE DUTY OF A PROSECUTING ATTORNEY IS NOT THAT OF A PARTISAN ADVOCATE, BUT IS HIS DUTY TO TREAT THE DEFENDANT FAIRLY UNDER ALL CIRCUMSTANCES AND TO CONDUCT THE TRIALS ON THE PART OF THE STATE IN SUCH A WAY AS TO LEAVE NO ROOM FOR CRITICISM AS TO THE METHODS USED IN TRYING TO SECURE CONVICTIONS. It is much more desirable to retain confidence in the purpose of the courts and other officers of the law by fair and just means than to try to secure convictions in case at all hazards." This we believe is a sound statement of the policy of the law and we believe the court should have followed it.

CONCLUSION.

Your petitioner respectfully submits that the decision of the Missouri Supreme Court is clearly in conflict with the former decisions of that State, with the decisions of this Court, with the Constitution of the State of Missouri and of the United States. We further submit that if no one of the petitioner's specifications of error are sufficient to have this matter reviewed by this honorable Court, this Court should consider the whole, and for all the errors appearing taken collectively, the judgment of the Supreme Court of the State of Missouri in this cause should be reversed.

Respectively Submitted,

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(17)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

ORVILLE GOLDEN, *Petitioner*,
vs.
STATE OF MISSOURI, *Respondent*.

No. 919

RESPONDENT'S ANSWER AND SUGGESTIONS IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI.

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INDEX.

	Page
RESPONDENT'S ANSWER TO PETITION	1
RESPONDENT'S ABSTRACT OF RECORD AND STATEMENT OF FACTS	1-11
FINAL VERDICT IN MISSOURI SUPREME COURT	11
RESPONDENT'S ANSWER, BRIEF AND ARGUMENT IN OPPOSITION TO QUESTIONS PRESENTED BY PETITIONER:	
QUESTION NO. 1	11
QUESTION NOS. 2, 3 & 4	13-14
QUESTION NO. 5	14-16
QUESTION NO. 6	16-17
QUESTION NO. 7	17-18
ARGUMENT	19
CONCLUSION	19-20

Table of Cases Cited.

Cotter v. U. S., 53 S. Ct. 291, 287 U. S. 666, 77 L. Ed. 575	14
Frank v. Mangam, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969	16
State v. Allen, (Mo.) 246 S. W. 946, l. c. 947, par. 7	14
State v. Bushong, (Mo.) 246 S. W. 919	18
State v. Cole, (Mo.) 174 S. W. (2d) 172, l. c. 173	15
State v. Finkelstein, (Mo.) 213 S. W. 465	18
State v. Golden, 183 S. W. (2d) 109	11
State v. Hamilton, 340 Mo. 768, 102 S. W. (2d) 642	14
State v. Marshal, 317 Mo. 413, 297 S. W. 63, l. c. 69	18
State v. Messino, 325 Mo. 743, 30 S. W. (2d) 750, l. c. 758	12
State v. Pyle, 343 Mo. 876, 123 S. W. (2d) 166, l. c. 168	12
State v. Taylor, (Mo.) 8 S. W. (2d) 28, l. c. 34	12
United States ex rel. Mason v. Hunt, 16 Fed. Supp., 285, l. c. 288, par. 7	16
U. S. v. Cotter, C. C. A., N. Y. 60 F. (2d) 689	14
Windon v. State, 93 So. 79, 18 Ala. App. 430	18
Ex parte Windon, 93 So. 924, 208 Ala. 701	18

Statutes Cited.

Section 3952, R. S. Mo. 1939	17
Section 4015, R. S. Mo. 1939	12
Section 4042, Mo. R. S. A	12
Section 4478, R. S. Mo. 1939	16

Texts.

24 C. J. S., Criminal Law, Section 1871	14
24 C. J. S., Criminal Law, Section 1873	18

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STATE OF MISSOURI, *Respondent*.
No.

RESPONDENT'S ANSWER AND SUGGESTIONS IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Comes now the respondent, State of Missouri, and for its answer to Petition for Writ of Certiorari, filed herein, contends petitioner has not shown sufficient cause why Writ of Certiorari should be granted and respectfully submits and shows to this Honorable Court:

RESPONDENT'S ABSTRACT OF RECORD.

The record of this cause as set out by petitioner in his petition under the heading of STATEMENT OF MATTERS INVOLVED, is substantially correct and is not reprinted here.

RESPONDENT'S STATEMENT OF THE FACTS.

The evidence in this case discloses that the Hod Carriers Building and Common Laborers Local No. 42 (hereafter referred to as the "Local") with offices in St. Louis, Missouri, was duly chartered by the International Hod Carriers Building and Common Laborers Union of America (hereinafter referred to as the "International") with offices in Washington, D. C., on February 7, 1933. During the year of 1941, from January 1, to October 11, Orville Golden, the defendant in this case, was the duly elected and acting Financial Secretary and Treasurer of the Local. Paul Hulahan and Earl Jenkins were business agents, and Edward Hill was president of the organization. The Constitution and bylaws of the Local set out the duties of these officers, and particularly those of the financial secretary, among which he was charged with rendering a detailed written report showing all moneys received by him and from what sources, deposit all moneys with a banking institution approved by the Local, and make a written report showing financial transactions of the Local each month. The bylaws also provided for a Board of Trustees who were charged with the duty of auditing the books of the financial secretary and treasurer, quarterly. They were suppose to check the entry with the bank deposits, statements, and other various data or memorandums. During the period from January 1 to November 11, the Local took in a total of $289,476.35. The total disbursements of the Local in the same period were $54,089.35. The Local had an account in the Telegraphers National Bank (the bank in which the money was supposed to have been deposited) which showed a balance of $34,495.13. Applying

the cash on hand and the amount collected against the disbursements, there should have beeen a balance of $269,-882.12 in the Telegraphers National Bank on October 11, 1941. We shall show later that much of this money was held in cash, in deposit boxes, and in the personal possession of the different officers of the Local. When the authorities began to investigate, the various officers brought in (in cash and checks) enough money to bring the balance in the bank to $183,866.65, but there was still a balance of $86,015.28 unaccounted for.

The process by which a person became a member of the Local was that he would come in and register, at which time he would either pay his initiation fee or he would pay in installments each pay period thereafter, until he had paid the total amount, for which he would be given a receipt. When he registered, an index card was made on which there was a symbol indicating the type of work he was qualified for (sometimes there was no symbol and the testimony is that in such case, it was to be considered as a "Commercial"). The symbols were, "C" or "X", (meaning Commercial), "T.N.T.", and "R" (meaning Residential). The "C" represented the highest type of work and the initiation fee was $56.50. These workers were eligible to work at defense plants such as the Remington Small Arms Plant. The "T.N.T." workers paid $31.50 and worked only at the T.N.T. plant at Weldon Springs, Missouri. The Residential worker paid $21.50 and was eligible to work only on residences such as bungalows and cottages. After the man had completed paying the total amount owed the Union as indicated by the symbol on the index card, he was required to turn in the receipts which had been issued for his payments whereupon he would be issued what

is known as a "work card" (the work card was a card showing that he was in good standing and entitled him to work upon the job he had qualified for). On the last receipt his name, Social Security Number, age, and address would be placed and that information would be forwarded to the International. The International would then mail him a "book" which had a place to be stamped as the worker paid his dues.

About September 1, 1941, the appellant disappeared. He was not seen again in the Local offices until September 22. He explained that he had gotten drunk in a small town in Missouri, and ended up in New Mexico. On the morning of Monday, September 29, there was gathered in the headquarters at 36010A, Finney Avenue, St. Louis, Missouri, the following people: Orville Golden, June Shaw, Mrs. Loulla Jones (Mrs. Jones and Miss Shaw were female clerks) and Edward Hill. Between the hours of 10:00 A. M. and 12:00 noon, a man came into the office, introduced himself as "Mr. Bard" and stated that he was an internal revenue agent sent from Washington, D. C. He displayed a large silver colored badge. He read a list of names from a sheet of paper with their titles consisting of Edward Hill, President of the Local, Paul Hulahan and Edward Jenkins, Business agents, Orville Golden, financial secretary and treasurer, William Poster, secretary of Local No. 110, St. Louis County, and John Taylor, a business agent of Local No. 53, which is the Negro division of Local No. 42. This man demanded that all of the above named people be present at the Local office on September 30, at 10:00 A. M. for questioning. On Tuesday morning, September 30, Bard returned accompanied by a man who introduced himself as "R. Morton." All of the persons named

above were present and after representing themselves to be internal revenue inspectors, Bard said that they were sent by Washington to investigate job selling on defense jobs. They asked questions about several different jobs and then went into their financial affairs. Hill told the men that Golden did all the banking and Golden told them that he banked at the Telegraphers National Bank. He then told them about a safety deposit box at the Lindell Trust Co. The man called Bard then said it would be necessary to investigate that box. Then they told Golden to get his hat and coat and left. He told the rest of the people to stay where they were. They left at about 11:30 (Golden and the two so-called agents) and Golden returned by himself at 1:30. Then Golden told them he had gone to the Lindell Trust Company with a man and that they had taken some $11,000.00 out of the safety deposit box. The men then took this money to the Federal Building but they gave Golden a receipt for the money. Golden said he was instructed to tell the people to remain where they were until 2:30 when the money count would be finished. At 2:30 the telephone rang and Golden answered. He told those assembled that it was the agents and that they said it would take longer than they thought to count the money and for everybody to be present the next day at 10:00 A. M. Morton and Bard did not appear the next morning nor have they been seen or heard of since. On the failure of the psuedo agents to make their appearance, the attorney for the Local, one William H. Bartley, was asked to investigate. He took the purported receipt to the offices of the collector of internal revenue and he there found that this was not a receipt of the collector's office nor were there any such men employed by the office, nor

was it their practice to take money into their possession—in short, they exposed the whole thing as a fake. The collector's office advised the attorney to go to the F. B. I.

Two Federal Agents by the name of Hunt and Duffy were put in charge of this case. They went to the Lindell Trust Company on October 2, and examined the deposit box from which the money was taken for finger prints and attempted to identify the two impersonators. They got signed statements from Huluhan on October 2 and Golden on October 3 as to what happened on the day of the 30th of September. These men also found out about the other safety deposit boxes and checked the account at the Telegraphers Bank. When the defendant was asked why they put the money in the safety deposit boxes instead of placing it in the banking account, he said that it was the "custom" to let money accumulate in the safety deposit boxes before depositing. The F. B. I. men then got permission to search Golden and his premises. They found $115.00 of the Union funds in the dresser drawer of Golden's bedroom, $370.00 in a chicken feed barrel in the garage at his home (which Mrs. Golden contended was her private fund). In his pocket they found $350.00 in his billfold, and $1,815.00 in one-hundred dollar bills, except for the fifteen dollars, in his side pocket, which Golden stated was Union money which he was carrying on his person because he did not think it would be safe to leave it at the Union headquarters (it is interesting to note here that on the day the safe at the Union offices was opened, it contained some $11,000.00 and that Golden later testified that it was a custom to allow money to accumulate in that safe before taking it to the bank). The agents questioned

the ladies, Shaw and Jones, and counted the money at the safe which amounted to $10,138.20. Golden then disappeared again until the day of the 7th, when they found him at his home and he said he had been drunk and had a hangover. They then checked the box No. 78 at the Lindell Trust Company where they found $26,512.73. Golden told them that he had this money there because there had been no deposit since July, 1941. They then checked the accounts in the name of the Union at the Telegraphers Bank and found $56,170.85 in the general fund, and $11,205.68 in the death benefit fund. There were also two money bags which had been left there but not deposited, in which there was $1,087.18 in checks and $1,175.00 in cash. All the money so far collected and discovered was then put in the Telegraphers bank. On October 8, these agents obtained statements from Jenkins and Taylor as to the fake internal revenue agents. On the 9th they checked box No. 922 at the Lindell Trust Company, held in the joint names of Mr. and Mrs. Golden and found $800.00 in defense bonds, all purchased in July of 1941. On that day Golden put the $800.00 and the $113.00 discovered on his person, back in box No. 101. They then went to the F. B. I. offices where Golden was questioned further in the presence of his wife. During the questioning, Golden's wife spoke up and said, "Now Orville, if you have anything you want to tell these men, or if you are holding anything out, or if you or anybody else has anything or any money you are not entitled to, I want you to tell the truth about it." Thereupon, Golden asked that his wife leave and he made a second statement in which he confessed that he and the other officers had embezzled $6,000.00 from the Union. He signed a statement to that effect and

said that he was glad to get it off his chest. The local police were then called and Golden was arrested.

The method used in juggling the funds and the books was this: A man would come in and pay for a Commercial ($56.50) card and it would be entered on the books as a Residential ($21.50), the difference being the amount pocketed. In many cases there was no entry made in the cash journal whatsoever. Now the events showed that there was supposed to be a quarterly audit made by the Board of Trustees of the receipts and disbursements of the local. This was done in 1940 but not in 1941. When the trustees attempted to make the audit as they were supposed to, Golden told them that because of the increase in business, it would be necessary to get a "State Auditor" to make the audit. Late in June, the president, Hill, sent a postal card to one Otto H. Lenfersiech, asking him to come in, which he did on June 30, and he was hired by Hill and the appellant to make a statement of the receipts and disbursements of the Local. He was only given a cash journal and a disbursement journal upon which to make his statement. When he asked about the membership list he was told that there were 3,600 names and that it would take too long. No other information in the way of books or ledgers was given him. He made one audit being for the last of 1940 and the first of 1941. Golden informed him that the banking was done at the Telegraphers Bank and he was never told of the money in the Safety deposit boxes. According to his audit he found a cash balance of $67,282.28. After the arrest of the appellant and the other officers, one Theodore Nischintz, a representative of the International, took over and suspended all of the officers. On October 15, Huluhan turned over $11,000.00 to this man which was in

a black bag and Hill gave him four cigar boxes with about the same amount of money in them. He then employed the Jeff K. Stone and Company to make an audit of the books of the Union. The auditor, Blecker (of Jeff K. Stone and Co.), testified that he started counting money on October 11, 1941, in the presence of the attorneys, detectives, etc., and found in box No. 301, which was in Hill's name, individually, at the Lindell Trust Co., $39,700.75 in cash, and checks in the amount of $5,047.32. There was also a black bag marked "Hill Building and Laborers Local No. 42" which contained $2,116.05. Then they counted the money in box No. 104, which was carried in the name of the Local, and it contained $1,035.53. They next counted the contents of box No. 78, carried in the name of the Local, which contained $26,119.88. On the 15th they counted four manilla bags at the Telegraphers Bank which contained $10,882.61. There was another bag of a different kind which contained $2,576.18. He was also given a small paper box by Nischintz which contained $68.63 which was identified as "small change" lying loose at the office. The total counted and deposited in the bank was $116,904.15.

The audit further showed that the total collections from all sources by the Local from January 1 to June 30, 1941, was $112,290.25. For the same period the cash journal showed only $61,718.91. There were no initiations recorded from July 1 to October 11, but the cash journal showed collections of dues and death benefits in the amount of $23,574.56. The actual amount of money collected in initiations from January 1, 1941 to October 11, 1941 was $246,579.50; from dues $39,031.85; from fines $340.00, and $3,525.00 in death benefits. The bank account at the Telegraphers Bank on January 1, 1941; in these funds, was

$34,495.13. The disbursements during the same period were $54,089.35. The total receipts plus the cash on hand was $323,976.48. After deducting the disbursements from the above figure, there should have been a total of $269,-882.13. When the audit started in October of 1941, there was $66,948.70 in the Telegraphers Bank and there was brought in from different sources, as stated above, $116,-918.50. This made a total of $183,866.85. Subtracting this from $269,882.13, which is the amount they should have had, leaves a balance unaccounted for of $86,013.28.

The biggest part of the bookkeeping and entries in the cash journal was made by the appellant. From April 28, 1941 to June 30, 1941, the receipt stubs showed $2,384.10, but Golden only listed $715.00 in the cash journal, a difference of $1,669.10, which the record shows was handled altogether by Golden in this period, unaccounted for.

The total initiations from January 1 to October 11, as shown by Golden's record, was 1,765, but the actual number was 3,839, as shown by the audit. On July 23, 1941, there was 130 initiations, but none of these were recorded either in the cash journal or the membership list, that is, no collections nor names were entered but there were 130 *blank lines* in the journal between July 19 and July 21, which the witeness Jones testified that Golden told her to leave. Breaking the evidence down further, the audit showed that between January 1, 1941 and June 30, 1941, there was $112,290.25 collected, which, added to the amount in the bank on January 1, would make a total of $146,785.38. The actual amount in the bank on June 30 was $67,282.28, making a difference of $50,571.31.

The evidence further showed that Golden signed all checks; that he was supposed to do all the depositing of

the money, and all the books were in his custody and under his control.

Many witnesses were called who were members of the Union and testified that they paid the $56.50, but, by comparison with the cash journal in the appellant's handwriting, it was found that these men were listed either at the $26.50 figure, or $31.50, or not listed at all.

FINAL VERDICT IN STATE COURT.

After verdict of jury in Circuit Court of the City of St. Louis, Missouri, assessing defendant's punishment at three years in the State Penitentiary, an appeal was allowed to the Supreme Court of the State of Missouri and its final decision and opinion is cited in 183 S. W. (2d) 109 (Advance Sheet No. 1, December 12, 1944). This decision is lengthy and for sake of brevity is not copied herein.

RESPONDENT'S ANSWER, BRIEF AND ARGUMENT TO PETITIONER'S "QUESTIONS PRESENTED."

The respondent has taken the questions presented by petitioner, under that heading, to this Honorable Court, and has endeavored to answer them in the same numerical order as they appear in petition.

> "Question No. 1. Is the fact that the defendant, Golden, was refused a continuance in view of the showing made of the adverse publicity and the investigations and prejudice on the part of the numerous jury panels called, denied his right of a trial by a fair and impartial jury as guaranteed by the 6th Amendment to the Constitution of the United States."

ANSWER.

Respondent respectfully contends and submits that defendant was not denied his right to a trial by a fair and impartial jury by Court's refusal to grant continuance.

BRIEF.

Counsel for defendant readily concedes that it is well established law; that the granting of a continuance is in the discretion of the Trial Court.

Section 4042, Mo. R. S. A;
State v. Pyle, 343 Mo. 876, 123 S. W. (2d) 166, l. c. 168.

The Trial Court did not abuse its discretion, or was it guilty of gross abuse of discretion, in denying continuance.

State v. Messino, 325 Mo. 743, 30 S. W. (2d) 750, l. c. 758 (and cases cited therein);
State v. Taylor, (Mo.) 8 S. W. (2d) 28, l. c. 31 (also cited by the defendant).

ARGUMENT.

The only question under this point is; was the Trial Court guilty of a *GROSS ABUSE OF DISCRETION* in denying continuance on ground of prejudice of the inhabitants of the County? In cases cited both by petitioner and respondent it is very clear that he did not.

Section 4015, Revised Statutes of Missouri 1939, provides a remedy, namely a change of venue to a different county or circuit when the inhabitants of county where case is pending are so prejudiced against the defendant that a fair trial cannot be had therein. This the defendant

did not avail himself of. It is the contention of respondent that, while the Trial Court did not abuse his discretion, the proper procedure to reach this alleged prejudice would have been through a change of venue. In the Taylor case, cited by both petitioner and respondent, the court in this connection said:

> " * * * It may be well to note here that the charges of local prejudice contained in this application for a continuance would have been more appropriate in an application for a change of venue. * * * "

Respondent therefore respectfully submits that he did have a fair and impartial trial with respect to Question No. 1, as presented by petitioner to this Court.

> "Question No. 2. Does the fact that the State of Missouri used evidence against the defendant, Golden, in the nature of secret reports and hearsay evidence, which the defendant was denied the right to see, violate his right to meet and confront his accusers as guaranteed by the 6th Amendment to the Constitution of the United States.
>
> "Question No. 3. Does the fact that Grand Jury notes were read to the Jury and placed in evidence under the guise of refreshing the memory of the witness and over the objection of the defendant, violate the right of the defendant, Golden, to face his accusers as guaranteed by the 6th Amendment to the Constitution of the United States.
>
> "Question No. 4. Does the fact that the defendant, Golden, was denied by the trial Court the right to cross-examine witnesses in order to show their bias and prejudice or interest in the case, violate his Constitutional rights as provided by the 6th Amendment to the Constitution of the United States."

ANSWER.

These questions can be answered No, for the reason, it is universally the law that a statement or testimony in a previous trial or proceeding of a witness can be used or read to him to refresh his memory, and the control and supervision in examining witnesses lie in the discretion of the Trial Court and will not be disturbed on appeal unless the Trial Court has abused this discretion to the extent of prejudicing the defendant.

BRIEF.

The trial Court's exercise of discretion in examining or controlling the examination of witnesses will not be disturbed, reviewed or revised except for abuse.

24 C. J. S., Criminal Law, Section 1871;
U. S. v. Cotter, C. C. A., N. Y. 60 F. (2d) 689.
Certiorari denied:
Cotter v. U. S., 53 S. Ct. 291, 287 U. S. 666, 77 L. Ed. 575;
State v. Allen, (Mo.) 246 S. W. 946, l. c. 947, par. 7;
State v. Hamilton, 340 Mo. 768, 102 S. W. (2d) 642.

ARGUMENT.

As to questions Nos. 2, 3 and 4, this Court and the Courts of Missouri have repeatedly held that the Trial Court has a large discretion, usually not reviewable, in the examination and cross-examination of witnesses. Respondent submits that the Trial Court in this case exercised a very fair discretion in this matter as to the rights of the petitioner and was not guilty of an abuse of his discretion.

"Question No. 5. Does the fact that the evidence in this cause was wholly insufficient to sustain the in-

dictment, violate the Constitutional right of the defendant under the 14th amendment which guarantees him that he shall not be deprived of his liberty without due process of law."

ANSWER.

This assignment is completely without merit based on the evidence of the shortage of accounts under defendant's supervision, custody and control; his handling of monies of the Union and in the face of his confession.

Defendant contends confession was obtained by trickery. This question is one for the Trial Court and jury to pass on. The jury by its verdict settled this question by undoubtedly believing confession to be voluntary and rendering a verdict of guilty. The trial Court settled the question of law as to the confession being voluntary by admitting it in evidence.

BRIEF.

Whether statements of defendant were voluntary is a question for jury.

State v. Cole, (Mo.) 174 S. W. (2d) 172, l. c. 173 (and a long line of cases cited therein).

The requirement of "Due Process" is met where, in proceedings affecting all persons alike, a person is presented by indictment in a court of competent jurisdiction for the commission of an offense under a law not, in itself, repugnant to the Federal Constitution, and tried in such court according to the rules applicable to proceedings in that jurisdiction in the course of an orderly administration

thereof after opportunity is presented for hearing and defense.

United States ex rel. Mason v. Hunt, 16 Fed. Supp., 285, l. c. 288, par. 7;

Frank V. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969.

(Note: The Mason and Mangum cases cited herein seem to answer *negatively* all the questions presented by petitioner to this Court.)

ARGUMENT.

There is an abundance of competent evidence touching defendant's guilt, and under the law the Trial Court did not violate defendant's constitutional rights in submitting this cause to a jury for its determination.

"Question No. 6. Does the fact that the indictment in this cause was vague, indefinite, uncertain, verbose and duplicious and failed to properly inform the defendant of the charges which he was called upon to meet, deny the defendant his right under the Constitution to be informed of the charges against him."

ANSWER.

The indictment does not violate the defendant's constitutional rights in that it does inform the defendant of the charges he shall meet and does conform and follow the language of the statute under which the charge is brought.

BRIEF.

Embezzlement by officer.

Section 4478, R. S. Mo. 1939.

Indictment, when not deemed invalid—For surplusage, or repugnant matter where there is sufficient matter alleged to *indicate* the *crime* and person charged.

Section 3952, R. S. Mo. 1939.

ARGUMENT.

The defendant complains of the indictment for the reason that it is lengthy and verbose. The crime charged by this indictment under the statute, or rather the acts of the crime, were lengthy, complicated and covered a long period of time, and were committed in such a way as to prevent detection and confuse any person attempting to learn the true facts.

The crime charged was one of great magnitude and scope and necessarily required an indictment covering same to be lengthy in order to set out and inform the defendant of what he was charged.

This cause was not a simple case of a man reaching in the cash drawer and embezzling a handful of money, but a series of acts of taking money and falsifying records.

The defendant would have a great deal more merit in this contention if the indictment had not set out the entire transaction.

This indictment follows the statute, charging embezzlement and informing defendant in detail as to the charges therein. Respondent submits that there is no merit to petitioner's complaint as to this indictment.

"Question No. 7. Does the fact Circuit Attorney, Morris, did everything he could to arouse the public against this defendant including making statements to the newspapers, investigating the jury system, appearing before the jury commissioners, writing letters to members of the Union, using unfair trial tactics, and doing

everything possible to obtain a conviction in this case, regardless of how it was accomplished, deny the defendant a fair and impartial trial as provided by the Constitutions of the United States and the State of Missouri."

ANSWER.

The first part of this question is answered under question No. 1, as to actions of prosecuting attorney outside the courtroom, newspaper articles and publicity affecting the jury panel, and in the opinion of the writer need no further discussion under this point. The respondent denies that the prosecuting attorney was guilty of, quoting petitioner, "Using unfair trial tactics, and doing everything possible to obtain a conviction in this case, regardless of how it was accomplished." Petitioner has not shown that Trial Court abused its discretion in controlling argument and conduct of counsel.

BRIEF.

Unless there has been a *prejudicial* abuse of discretion, the Appellate Court will not disturb the Trial Court's exercise of discretion in controlling the character and scope of the arguments and the conduct of counsel.

24 C. J. S., Criminal Law, Sec. 1873;
State v. Marshall, 317 Mo. 113, 297 S. W. 63, l. c. 69.

Same rule as to measures and steps to be taken in consequence of improper argument or misconduct.

State v. Bushong, (Mo) 246 S. W. 919;
State v. Finkelstein, (Mo) 213 S. W. 465;
Windon v. State, 93 So. 79, 18 Ala. App. 430;
Ex parte Windon (Certiorari Denied), 93 So. 924, 208 Ala. 701.

ARGUMENT.

Petitioner's prayer to have this question reviewed by this Honorable Court is not supported either by the record or by the law. These matters were ruled on by the Trial Court in the exercise of his discretion, and the petitioner has not shown any prejudicial abuse of that discretion, which would or could be said to have violated his constitutional rights under the Federal Constitution.

Petitioner's claim of bias and prejudice of the prosecuting attorney is without merit in the judgment of the writer, and his actions were only those of any qualified prosecuting attorney who was mindful of his oath and duties as a representative of the people of the State of Missouri. He was vigorous and uncompromising in the discharge of duties in the prosecution of a serious offense committed by defendants in a position of trust among their fellow workers, and should be commended, rather than criticized.

CONCLUSION.

Petitioner, under the heading of REASONS FOR GRANTING THE WRIT, contends the affirmance of the jury's verdict by the Supreme Court of the State of Missouri deprived this defendant of his liberty without due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

Respondent has, without taking advantage of any legal technicalities or rules, endeavored to clearly show this Honorable Court the defendant was accorded a fair and impartial trial, and was not denied any of his rights under either the Constitution of the State of Missouri or

of the United States, or deprived of his liberty without due process of law.

Wherefore, respondent earnestly contends that a Writ of Certiorari should not be issued by this Honorable Court, and that the petition should be dismissed and Writ of Certiorari denied.

Respectfully submitted,

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v